



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/37

Judgment No.: UNDT/2012/139

Date: 18 September 2012

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

NYAMBUZA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Miles Hastie, OSLA

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM

Elizabeth Gall, ALS/OHRM

Introduction

1. The Applicant joined the United Nations Observation Mission in the Democratic Republic of Congo (“MONUC/DRC”) (as it then was), on 3 February 2004 as a Junior Clerk on a 300-series appointment at the GL-2 level.

2. The Applicant contests a decision, dated 6 November 2008, summarily dismissing her from MONUC for improperly soliciting and receiving monies from local citizens in exchange for their initial recruitment and continued service as United Nations staff in violation of staff regulations 1.2(b), (e), (f) and (g) and under staff rules 301.3(e) and (i).

Facts

3. As a result of complaints addressed to MONUC’s Regional Administrative Officer some time in late 2005 or early 2006 by several Casual Daily Workers (CDWs), an investigation was conducted by the Special Investigations Unit (SIU) concerning allegations that several staff members in the Engineering Section, MONUC, Bukavu, had forced them to pay money to secure and then retain their jobs in MONUC. The Applicant was one of those against whom allegations were made.

4. On 5 June 2006, SIU investigators submitted a Preliminary Investigation Report. On 30 August 2007, the case was referred by the Department of Field Support (DFS) to the Office of Human Resources Management (OHRM).

Charges and Applicant’s comments on the charges

5. By a memorandum dated 12 November 2007, the Director, Division for Organizational Development, OHRM, notified the Applicant of the charges against her. The Applicant submitted a response to the allegations thereafter.

6. In her response to the charge letter, the Applicant stated:

- a. She had no role in the recruitment of CDWs.
- b. She did not know either Mr. Masudi or Mr. Lievain, two of the three complainants.
- c. She was supervised by three international staff members in the recruitment process of CDWs and it was the Chief of the Engineering Section who reviewed the lists of CDWs.
- d. She was on maternity leave at the time Mr. Lievain, the third complainant, alleged that he had made a payment to her.
- e. A key witness and accuser recanted his statements against the Applicant and alleged that there had been a plot to have her services terminated.

JDC Review

7. A Joint Disciplinary Committee (JDC) Panel was established on 13 July 2008 to consider the Applicant's case and held its hearing on 13 August 2008. On 7 August 2008 one of the complainants, Mr. Telesphore Bisho, addressed a letter to the JDC Panel recanting his testimony against the Applicant. In his letter, he informed the JDC that certain expatriates and other Congolese were trying to get even with the Applicant and had promised him a contract with MONUC if he implicated the Applicant in misconduct.

8. The Panel transmitted its report to the Secretary-General on 3 October 2008. The Panel unanimously found that on the balance of probabilities, the evidence supported the allegations that the Applicant solicited and received payments from three CDWs in exchange for recruitment and continued employment and unanimously recommended that she should be separated from service.

9. On 6 November 2008, the Deputy Secretary-General informed the Applicant that the Secretary-General had examined her case in the light of the JDC's findings, conclusions and recommendations, as well as the entire record and the totality of the circumstances. The Secretary-General accepted the conclusions of the JDC and its recommendation. The Secretary-General was of the view that the Applicant's actions were inconsistent with the standard of integrity required of international civil servants and that the severity of her misconduct was incompatible with continued service in the Organization. Pursuant to his discretionary authority in disciplinary matters, the Secretary-General decided that in accordance with staff rule 110.3(a) (vii), the Applicant would be separated from service without notice or compensation in lieu thereof.

10. The Applicant was also informed that in accordance with staff rule 110.4(d), she could appeal the decision directly to the former UN Administrative Tribunal.

11. On 29 June 2009, the Applicant submitted the present Application to the former UN Administrative Tribunal. The Respondent filed the "Respondents Answer" on 18 December 2009. The Application was subsequently transferred to this Tribunal.

12. The Tribunal moved to Kinshasa, DRC, for the hearing of this case from 12 to 13 July 2011. Interpreters who secured the interpretation from English into French and vice-versa were present. During the hearings, the Tribunal, received testimony from the following witnesses:

- a. The Applicant herself.
- b. Mr. Jacinto Bala. (One of the two investigators in this case).

13. On 11 August 2011, the Respondent filed a Motion to re-open the proceedings on the grounds that the United Nations Organization Stabilization Mission in the Democratic Republic of Congo ("MONUSCO") had managed to

locate one of the complainants, Mr. Bisho, who was previously not available. Mr. Bisho had stated that the Applicant had approached him for payment before being hired as a CDW but on 7 August 2008, several days before the JDC hearing of the case, the JDC Secretary received a communication that Mr. Bisho had recanted his testimony.

14. The Applicant filed her response to the Motion on 15 August 2011. In her response, Counsel for the Applicant opposed the Motion on the following grounds:

- a. The Applicant should not be penalized for the failure by the Respondent to put its case in order prior to the hearing.
- b. There is no provision in the Statute or Rules of Procedure of the Tribunal to allow for the re-opening of a case, in the manner sought by the Respondent, prior to the issuance of the Judgment in the case.
- c. The Tribunal moved to Kinshasa, at considerable effort and expense, to hear witnesses from the DRC in person. The reopening of proceedings would mean a resumption of proceedings in Kinshasa which would be enormously wasteful of resources.

15. On 22 August 2011, the Tribunal granted the Respondent's Motion to reopen the proceedings. On 13 December 2011, the Tribunal received testimony from Mr. Bisho for the Respondent via teleconference. On 14 December 2011, Mr. Bisho failed to attend the hearing for cross-examination by Counsel for the Applicant.

16. The Applicant and the Respondent filed their closing submissions on 29 December 2011 and 26 January 2012 respectively subsequent to an extension of time request being granted by the Tribunal.

Applicant's Case

17. The Applicant frames her case as follows.
18. She had no control over hiring. Either she was given a handwritten list of CDW candidates, or her supervisor collected the number of ID cards required and she then transcribed the information they provided.
19. Both her supervisor and the Officer-in-Charge reviewed the lists. She passed along the finalized copy of the list to security officers to post by the gate.
20. Not only did she not have control over the process, the CDWs knew her supervisor did, because he either handwrote lists or collected IDs at the gate since the CDWs often spent one to two months hanging about outside the gate.
21. Often there was no rotation of particular skilled workers each month because the supervisor/OIC selected particular people they wanted.
22. She did not know two of the complainants, Mr. Masudi and Mr. Lievain.
23. During much of the time when she was accused of tampering with the CDWs lists, she was on maternity leave. Her leave lasted from 1 June 2005 to 20 September 2005. She had a replacement covering her duties during this period. During her maternity leave, the complaint of Mr. Lievain alleged that he approached the Applicant to pay her twice and that the Applicant was successful in preventing Mr. Lievain from being rotated.
24. Mr. Bala presented evidence of a broad investigation that was rushed, understaffed and under-resourced. It was a complex investigation: thirteen individuals were accused of either committing or facilitating offences for others. Two investigators were tasked with carrying out the investigation part-time, in addition to their regular responsibilities.

25. According to Mr. Bala, the investigators were not given access to the Applicant's attendance sheets to verify her ability to effect the accused extortions and they were not aware of her maternity leave. The investigators were given no access to the CDW rosters to attempt to track any changes in the rosters or to identify further relevant witnesses.

26. The Preliminary Investigation Report reflects that each of the accused staff members appeared to make indiscriminate allegations against one and other, making it very difficult to ascertain the truth. The number of people involved as witnesses or accused meant that many others knew of the investigation. Regrettably, as the documentary record reflects, there is no description of the questions asked of each of the witnesses and the final report does not deal with each accusation or accused staff member discretely.

27. The Administration's case is based exclusively on hearsay evidence of witnesses the Applicant claimed not to know. There is no documentary evidence in support of the charges. There is no direct testimony beyond the statement of the three former CDWs of any payments to the Applicant and no documentary circumstantial evidence in support of their statements.

28. There was one witness, Mr. Bisho, who gave live evidence before the Tribunal. The witness, however, declined to submit to cross-examination. Mr. Bisho's evidence was not incidental. It formed the basis for reopening the case. On any view, it was not uncontroversial. The witness gave evidence completely repudiating his previous testimony at the JDC and his trial evidence displayed numerous inconsistencies with past statements. If the case were to turn on the evidence of Mr. Bisho, the need for cross-examination was vital.

29. As the Applicant had no opportunity to cross-examine Mr. Bisho, the Applicant submits that Mr. Bisho's new evidence was no better evidence than an untestable audio-recording and little better than a written transcript. His evidence should be excluded. If it is admitted, it should be given less weight, quite

independent of its content. Mr. Bisho's willingness to provide new evidence in direct examination but unwillingness to attend for cross-examination permits an inference to be drawn about his credibility. However, the real indictment of Mr. Bisho's evidence is its extraordinary set of unexplained contradictions.

30. If the evidence of Mr. Bisho is excluded, together with the hearsay evidence of Messrs. Lievain and Masudi, the Tribunal is left solely with the Applicant's evidence. Her account is believable, requiring no incredible suppositions, it is internally consistent, it is consonant with evidence she has given in the past, it is in accordance with documentary records concerning her maternity leave and it was unshaken under cross-examination.

31. The Respondent denied the Applicant due process by failing to properly investigate the facts of the case. Information regarding the nature and scope of the allegations against her was not disclosed and she was not advised of the evidence against her or the right to counsel. A number of "Voluntary Statements" were produced at trial. To date, the entirety of the Preliminary Investigation Report and its annexes have not been produced.

32. On the basis of the foregoing, the Applicant requests the Tribunal to order:

- a. That the decision taken by the Secretary General be rescinded and that she be retroactively reinstated in her former position at MONUC;
- b. That the Applicant be paid all salary, benefits, and allowances retroactively from the date of her separation from service at the level at which her salary at her time of dismissal, with annual step increments until the date of the Tribunal's judgment; or failing that:
- c. That the Applicant be paid compensation in the amount of 2 years' net base salary;

d. That she be paid USD10,000 compensation for moral and professional injury suffered (including the emotional stress during her state of pregnancy and the consequent risk to the health of both the Applicant and her unborn child) as a result of her wrongful termination; and

e. To award her pre-judgment and post-judgment interest.

Respondent's Case

33. The Respondent's case is as follows:

34. The decision to separate the Applicant from service for misconduct constituted a proper exercise of the Respondent's authority and was within the discretion of the Secretary General.

35. The Applicant's denials, on their own, do not contradict the complainants' description of her scheme of soliciting and taking money from CDWs. The former JDC unanimously found that the charges against the Applicant were established. The former JDC relied on the evidence of Messrs. Masudi and Lievain and drew no conclusions from the evidence of Mr. Bisho.

36. The former JDC concluded that Messrs. Hussein and Lievain were credible due to the consistency of their statement against the Applicant, the similarities in the detail with which they recalled the incidents and the absence of any motivation to lie. Having weighed the evidence of Messrs. Hussein and Massudi and assessed their demeanour at the hearing, the former JDC found that the Applicant, more likely than not, had collected payments from the complainants in exchange for jobs at MONUC.

37. In the face of the evidence of Messrs. Hussein and Lievain, the former JDC did not accept the Applicant's evidence that she was not in a position to

alter the list of CDWs. Likewise, the fact that she was away on maternity leave did not mean that she could not have received money from the workers.

38. The former JDC concluded that the Applicant could have received payment as she lived close to MONUC Headquarters and she had visited the compound on several occasions while on maternity leave. Furthermore, Mr. Lievain stated that, when the Applicant was not at work, he visited the Applicant at her “accommodation” and handed over USD20 in order not to be rotated the following month. The Respondent is of the view that, like the former JDC, the Dispute Tribunal should not accept the Applicant’s evidence as credible.

39. During the hearing in Kinshasa, the Applicant presented the same testimonial evidence to the Tribunal as she did during the hearing before the former JDC. She has not presented any new facts or evidence to challenge the evidence of Messrs. Hussein and Lievain. Notably, the Applicant did not call a single witness to rebut the evidence on record.

40. The Applicant could not provide a credible explanation as to why she could not manipulate the lists. It is insufficient for the Applicant to simply argue that Messrs. Hussein and Lievain are liars without proffering a credible explanation as to why her version of the facts should have been accepted by the former JDC. As the JDC correctly observed, there was no evidence to conclude that the witnesses were lying.

41. On cross-examination, the Applicant testified that no other staff member typed up the list of new recruits and the payroll list. Though the Applicant explained to the Tribunal that her supervisors would approve the lists before they were posted, there is no evidence on record that her supervisors actually signed their approval of the lists. The Applicant never called her supervisors as witnesses either before the former JDC or this Tribunal to corroborate her explanation that she could not have manipulated both lists.

42. When asked by the Tribunal what both lists looked like upon her supervisors' approval, the Applicant could not answer the question. The Applicant was the last person to have possession of both lists before they were posted at the security entrance. There is no evidence that the Applicant was either closely monitored or that the list of new recruits was checked by another person in order to ensure that the integrity of recruitment process was not compromised. In this regard, the former JDC correctly found that the Applicant was certainly in a position to improperly add a name to the list.

43. The Applicant was asked on cross-examination whether she knew Mr. Saio Badesire who was allegedly collecting money from local staff on her behalf. While the Applicant confirmed knowing Mr. Badesire she denied the allegation that Mr. Badesire collected money on her behalf. The Applicant did not present any evidence before the Tribunal to prove that Mr. Badesire did not collect money from the complainants on her behalf.

44. The Applicant also submitted at trial that she had no role in the recruitment of CDWs. It was established that the Applicant gave the perception that she had the authority to hire and fire CDWs by virtue of the fact that she was responsible for the list. The Applicant simply exploited this perception for financial gain.

45. Though the Applicant did not cross-examine Mr. Bisho, his evidence is relevant. The probative value of Mr. Bisho's evidence outweighs any prejudice the Applicant may suffer due to the fact that her Counsel did not have the opportunity to cross-examine him. The Respondent submits that Mr. Bisho's evidence should be considered.

46. Mr. Bisho's explanation for retracting his accusations against the Applicant before the JDC should also be considered. Mr. Bisho recalled that before the JDC hearing the Applicant visited him and asked him to retract his accusations against her which he did in a letter to MONUC dated 7 August 2008.

In his letter, Mr. Bisho stated that he was asked by other MONUC staff members to make allegations against the Applicant in exchange for a job.

47. While the Secretary-General and the former JDC did not rely on Mr. Bisho's prior statements, the evidence he gave before the Dispute Tribunal corroborates the statements given by Messrs. Hussein and Lievain that she took money from them in exchange for jobs. Should the Dispute Tribunal not consider Mr. Bisho's evidence, the Respondent is of the view that Messrs. Hussein and Lievain's statements before the former JDC provided clear and convincing evidence of the Applicant's conduct.

48. In sum, the facts were established according to the applicable standard of proof of clear and convincing evidence. Each witness described in detail the process of having to pay the Applicant to secure and retain a job. Based on the evidence elicited from the Messrs. Hussein and Lievain at the JDC hearing, it was entirely proper for the panel to establish that the Applicant had solicited and received payments from at least two workers for recruitment and continued employment at MONUC. Their evidence alone amounted to clear and convincing evidence that the Applicant solicited and received money from them in exchange for employment at MONUC. Accordingly, the Secretary-General properly exercised his discretion in accepting the former JDC's recommendation.

49. The Applicant submits that her due process rights were violated because the allegations were not thoroughly investigated. The Applicant also stated at trial that she was never interviewed during the fact-finding process. This is factually incorrect. The Security Officer who collected the facts in this case, Mr. Jacinto Bala, testified that he specifically interviewed the Applicant. Therefore, there is no evidence to support the Applicant's contention that her due process rights were violated during the investigation.

50. In accordance with paragraph 6(a) of former ST/AI/371, "Revised disciplinary measures and procedures", the Applicant was informed of her right

to submit comments, if any, within two weeks of receiving the charges. She was also advised of her right to seek the assistance of counsel and that, should she not avail herself of the opportunity to comment within the specified deadline, her case would nevertheless proceed.

51. The Respondent submits that the Applicant's due process rights were fully respected in accordance with the former Staff Rules and former ST/AI/371.

52. In view of the above, the Respondent requests the Dispute Tribunal to reject this Application.

Considerations

The Evidence

The Applicant's testimony

53. The Applicant's testimony at the hearing of 12 July 2011 is summarised below.

a. She prepared the list of new recruits from a list that came from the international supervisors. She was not the one who made the decisions on recruiting the daily staff. This was done by the supervisor of each unit together with the Officer-in-Charge.

b. The rotation of CDWs was only done when new CDWs were required, when there was a new project or when they were recruiting. When the new system of rotation came into place, only the "helpers" were rotated. The technicians were not rotated. It was only the "all-rounders" who were rotated.

c. It was only the supervisors who knew the list of CDWs who were to be rotated. They would rotate the number of people they wanted and take on new ones.

d. What “rotation” means is that a list was posted at the main gate and if 10 people were to be rotated, the 10 names were put up and also the names of the 10 others of the previous month who were going to leave. This recommendation came from Kinshasa. They called it rotation but it was just a system of replacing staff.

e. She could not have manipulated the list because when the heads of unit went on mission, they took copies of names and they also knew the individuals concerned. If the heads of unit returned and saw a different person whose name was not on the list, this would have caused problems.

f. It was not within her power to change the lists. All the lists were signed by the supervisors and sent to each unit. She could not change or add anyone to the list because after the list was typed up on the computer, the signature of the supervisor was appended to it.

g. She has never received any money from a CDW. Those who allege that she has are jealous of her. Hers and her husband’s salaries were adequate for their needs and there was no need for her to demand USD20 from a CDW.

h. She knew Mr. Bisho because he worked in their Engineering Section at the airport. She never asked him for money and did not even know how he was hired. She had never told Mr. Bisho that people had to pay to work at MONUC. Mr. Masudi, Mr. Bisho and Mr. Lievain all worked at the airport at the same time. According to what she heard from others, they were best friends. She did not know why they made allegations against her.

i. Since her separation from service from MONUC in 2009, she was employed by a local NGO where she was paid USD300 a month.

Mr. Jacinto Bala's testimony

54. Mr. Bala's testimony at the hearing of 13 July 2011 is summarised below.

a. Prior to joining the Organization, he was in the Philippines' military. He has undertaken investigations in the military police and also when he was serving in the Philippines' navy. He has worked in the security section of MONUC and now MONUSCO for over seven years.

b. His role in this case was as the investigator. He and his colleague, Mr. Manfred Grauber, were assigned this task as part of their duties of investigating cases involving UN staff, UN equipment and issues of losses, debts and allegations.

c. This particular case came about from allegations and written complaint letters by CDWs in the Bukavu Engineering Section. The complaints were not only about the Applicant but also several other staff members.

d. In relation to the Applicant's case, the complainants gave voluntary statements. They were interviewed in person and asked to provide voluntary statements on their allegations against the Applicant. After taking their statements, he interviewed those involved including the Applicant. He asked them to provide voluntary statements taken from the interview. He also interviewed Mr. Masudi, and Mr. Lievain as well as Mr. Bisho. The complainants were not forced or coerced to give their statements.

e. He also interviewed the Officer-in-Charge of the Engineering Section, Mr. Adelana Jackson. Mr. Jackson stated that the allegations against the Applicant and other staff members working under him, were false and only intended to discredit her. Mr. Masudi and Mr. Lievain's statements were recorded by other National Staff members and witnessed

by Mr. Gruber. He was not present during the interview of both staff members.

f. He submitted the report to the Special Investigations Unit in Kinshasa. He heard about the case in 2008 when the JDC went to Kinshasa. He never gave evidence before the JDC.

Mr. Telesphore Bisho's testimony

55. The Tribunal received direct evidence from Mr. Bisho when the case was reopened but he failed to attend the second day of the hearing for his cross examination by Counsel for the Applicant. Mr. Bisho's testimony at the hearing of 13 December 2011 is summarised below.

a. He used to be employed in MONUC at Kavumu Airport as the head of CDWs in the Engineering Section. He was responsible for giving them different tasks at either the Indian or the Pakistani camps at Kavumu Airport.

b. The Applicant was in charge of all the workers. She was responsible for recruiting CDWs in Bukavu who would then be transported to Kavumu.

c. He collected his salary from the Applicant every month. The Applicant asked him for money to keep his job and sometimes she deducted money from his salary without asking him. She did this to a number of people. There was never a fixed amount of how much the Applicant collected. Sometimes it was USD30 and at other times USD20.

d. He complained to Mr. Jackson and the MONUC Bukavu security section but nothing was done. Other workers complained to him that the Applicant deducted money from their salaries.

e. New recruits were employed after paying the Applicant. The CDWs were rotated every month except him and his deputy. The new CDWs had to pay about USD20 to keep their jobs and when he asked them to put more effort in the job, their response was that he should not put them under any more pressure because they had already paid to get the job.

f. Those CDWs who refused to pay were rotated immediately. Rotation meant that they were replaced for a particular month and that would mean losing their jobs for a while. After the month, they would not necessarily be rotated back immediately and some workers left MONUC frustrated after this. Other workers came back to pay money in order to get back to the system.

g. Mr. Lukembe Mutola Dudu collected money from the workers on behalf of the Applicant. There were instances when he actually saw Mr. Dudu doing this.

h. There was an instance when someone gave him money to secure a job but he deposited the money with the MONUC security section in Kavumu and in particular to one Jerome Bisimwa and a Kenyan national. He asked Jerome to hand over the money in Bukavu to prove that CDWs were handing over money to keep their jobs but Jerome did not do so. When he was paid he returned the money back to the person who had come to request him a job because he had received death threats from that person.

i. He was accused of stealing cement and was put in prison. Packets of cement were stolen on a Sunday yet MONUC did not operate on Sundays. The Applicant and one Mr. Bagula accused him to divert attention from his own accusation against them for asking people for money in exchange for casual jobs at MONUC.

j. The statement allegedly issued by him recanting his allegations against the Applicant was a forgery since it was not in his handwriting. The Applicant had visited him and asked him to write a letter retracting his accusations against her and promised him that in exchange she would ensure that he was reinstated in MONUC. The Applicant also gave him the addresses to which he should send his retraction.

k. He wrote the retraction letter at the Applicant's sister's house and then accompanied the Applicant to a cyber café from where he sent the letter. After sending the letter, he took part in a teleconference.

l. Everything he had written in the retraction letter was what the Applicant had wanted him to say. He did not get his job back after the teleconference. All he got were empty promises from the Applicant.

The Preliminary Investigation Report

56. The Tribunal did not receive any direct evidence from two of the CDWs who alleged to have paid money to secure and retain their jobs in MONUC, Messrs. Lievain and Masudi. This was because the Respondent could not produce any of them.

57. In deciding on the credibility of Messrs. Lievain and Masudi, the Tribunal is in the circumstances constrained to examine the Preliminary Investigation Report dated 5 June 2006 and the translated summaries of voluntary statement made by Messrs. Masudi and Lievain on 20 March 2006 and 28 March 2006 respectively, which were annexed to the Report.

Mr. Masudi's complaint

58. Mr. Masudi was one of the three complainants who complained about abuse of authority by the Applicant. His statement was recorded and translated

by another national staff member, witnessed by the second investigator, Mr. Gruber and is summarized below:

- a. He was trying to get a job as a CDW in the Engineering Section on 16 December 2004. On that day, he met the Applicant at the front of the headquarters office in Bukavu.
- b. The Applicant was selecting local people as CDWs for the Engineering Section. The Applicant told him that if he wanted to be selected as a CDW, he would have to pay USD20.
- c. On 18 December 2004 at 1748 hours, Mr. Masudi handed over USD20 to the Applicant in front of the headquarters office in Bukavu. Mr. Masudi recalled the exact date and time of the handover because he kept a diary about important daily occurrences. He was subsequently recruited as a CDW on 1 February 2005.
- d. He worked from February to April 2005 in the Indian camp at Kavumu Airport and paid USD20 every month to the Applicant in order not to be rotated.
- e. In May 2005, he started working in the Chinese Camp at the peninsula and paid USD20 to Mr. Sayo who was the supervisor there in order not to be rotated. In July 2005, Mr. Sayo requested USD 50 from Mr. Masudi. Mr. Masudi refused to pay and was informed by Mr. Sayo on 21 August 2005 that he would be rotated with immediate effect.
- f. He visited Mr. Jackson at his residence and expressed his concerns. Mr. Jackson told him to put down his complaint in writing and to send it to his office email address. Mr. Masudi forwarded the said email to Mr. Jackson on 24 August 2005.

Mr. Lievain's complaint

59. Mr. Lievain was the second complainant. His statement was recorded and translated by another national staff member, witnessed by the second investigator, Mr. Gruber and is summarized below:

- a. He applied for a job as a CDW with MONUC in June 2005. After trying for two months without success to find work, he was advised by other job seekers that if he wanted to be considered for employment with MONUC he would have to contact the Applicant.
- b. He approached the Applicant in August 2005 as she walked into the MONUC compound. She asked him for USD20 to put his name on the list of CDWs. He handed her the money. There were no witnesses to the transfer. She also changed his name from "Lievain K." to "Lievain Iraqi" so that he could remain on the list without attracting attention.
- c. He worked as a CDW from 16 August 2005 until 21 October 2005 without being rotated.
- d. On 5 September 2005, he received a salary for four working days. Since the Applicant was not present at the office, he went to her accommodation and handed her the money so as not to be rotated in the following month. He also made a payment of USD20 in October 2005.
- e. At the end of October 2005, the Applicant requested half of his salary for the period 21 September 2005 to 21 October 2005. He refused to pay and was consequently rotated effective 21 October 2005. The last time he worked as a CDW was for four days commencing 17 November 2005.

Admissibility and relevance of evidence and the evidentiary burden of proof

60. This Tribunal has on previous occasions commented on the shortcomings of relying on written witness statements. When the person who provided the information recorded in them does not appear in the ensuing judicial proceedings, the truth of the contents of these documents cannot be tested by cross-examination in an open hearing and therefore have little probative value.

This practice of placing reliance upon recordings in initial fact finding exercises and interview notes of appointed investigators in an effort to establish gross misconduct warranting summary dismissal before the Tribunal is grossly inadequate and cannot establish the facts in issue¹.

61. In disciplinary cases, where the charges against a staff-member are quasi-criminal in nature, the burden of proof rests with the Respondent to produce evidence that raises a reasonable inference, higher than the balance of probabilities standard that misconduct has occurred.

Has the Respondent met the evidentiary burden of proof in this case?

62. A review of the evidence in this case raises a number of pertinent questions that address the credibility of the factors relied upon by the Secretary General to summarily dismiss the Applicant. Some of these are discussed below.

63. The Applicant gave evidence that she prepared the list of new recruits from a list that came from the international supervisors. She was not the one who made the decisions on recruiting the daily staff. This was done by the supervisor of each unit together with the Officer-in-Charge. The Applicant also stated that she could not have manipulated the list because when the heads of unit went on mission, they took copies of names and they also knew the individuals concerned. If the heads of unit returned and saw a different person whose name was not on the list this would have caused problems. The Respondent did not adduce any evidence to rebut the Applicant's assertions, or to show how the

¹ Applicant, UNDT/2012/054.

Applicant manipulated the list of new or recruits, or placed any unapproved names on the list.

64. The Applicant testified that she had never met two of the complainants, Mr. Masudi and Mr. Lievain, from whom she allegedly extorted money for jobs. The absence of these two complainants from the proceedings meant that the Tribunal did not have an opportunity to assess their credibility. Their recorded statements alone are not sufficient to establish their allegations against the Applicant. Given these circumstances, who is the Tribunal to believe?

65. The Tribunal is minded to accept the Applicant's denial that she received any money from these two individuals considering that her evidence has remained entirely consistent from when she responded to the allegations against her, to the JDC proceedings and now before the Tribunal. In addition, the question of how she would still be able to manipulate the lists of CDWs even during her absence from the office on maternity leave when a maternity replacement had taken her place was never properly investigated or proven.

The often recanted evidence of Mr. Telesphore Bisho

66. On 10 March 2006, Mr. Bisho recorded a statement which was translated by another national staff member and witnessed by the second investigator, Mr. Gruber. Mr. Bisho stated, inter alia, that in December 2004, the Applicant asked him for money in order to recruit certain CDWs from a list he had provided to her. When he refused to pay, she replaced the listed people with others drawn mainly from Bukavu city.

67. A few days before the JDC hearing, on 7 August 2008, Mr. Bisho sent a communication to the JDC Secretary hearing the Applicant's case recanting his statement. At the JDC hearing on 13 August 2008, he told the JDC Panel that several international staff members and security officers had pressured him into making a false complaint against the Applicant and that his letter recanting was done as a matter of conscience.

68. Before this Tribunal on 13 December 2011, Mr. Bisho stated that the statement allegedly made by him recanting his allegations against the Applicant was a forgery since it was not in his handwriting and that everything he had written in the retraction letter was what the Applicant had wanted him to say.

69. As indicated earlier, Mr. Bisho had sent a communication to the JDC Secretary hearing the Applicant's case recanting his testimony and even attended the JDC hearing to give evidence. How could he then argue that the recanting letter was a forgery? He had begun to deny his initial complaint even as early as the JDC hearing.

70. Mr. Bisho has proven to be an unreliable witness. He has recanted his statements on more than one occasion and failed to attend the second day of the hearing before the Tribunal for his cross-examination. The Tribunal finds that the evidence tendered by Mr. Bisho is inadmissible and has no probative value.

The Preliminary "Investigation"

71. Mr. Bala gave evidence of what can only be described as a farcical investigation. It appears that the entire investigation consisted of asking witnesses to give what were described as "voluntary statements" from which the investigators drew unsubstantiated conclusions. They did not interview the Applicant and others accused of extortion. The investigation process was astoundingly incompetent that it ought not to have provided a basis for any disciplinary action. In the Preliminary Investigation Report, the investigators concluded:

the allegations d[id] not in effect produce a concrete, sufficient evidence to pursue the involved persons and to clear this (sic) allegations once and for all. Although, the proof and evidence of the personal receipt of the money collected cannot be established, the collective complainant letters submitted by the daily casual workers who readily and voluntarily stated in their complaint letters cannot be ruled out as false, artificial and fictitious complaints.

72. Having acknowledged that they lacked sufficient evidence and that they had not established whether any money was in actual fact paid or received by anyone, the investigators nevertheless went on to recommend that administrative sanctions be instituted against those against whom allegations were made, including the Applicant in this case.

73. There is no record of what questions the complainants were asked and what their individual responses to the questions were. The investigators failed to investigate certain explanatory and exculpatory claims made to them by the Applicant and the Applicant's supervisor. They did not check the Applicant's leave records to ascertain whether she was at work on the dates the alleged payments were said to have been made to her.

An investigator must be committed to ascertaining the facts of the case through relevant inquiry involving the questioning of witnesses, forensic evidence where necessary and identification and collection of relevant documentary evidence. The investigator's findings should be based on substantiated facts and related analysis, not suppositions and assumptions. Factual accuracy is very important².

74. This Tribunal has consistently held that establishing criminal liability in investigations and judicial proceedings even in the context of a civil matter, such as in the present case, must necessarily require that a standard higher than the ordinary one of a balance of probabilities must be attained. In disciplinary cases where the charges against a staff-member are quasi-criminal in nature, the burden of proof rests with the Respondent to produce evidence that raises a reasonable inference, higher than the balance of probabilities standard that misconduct has occurred³. This requirement was not met in the present case.

² *Ibid.*

³ *Borhom* UNDT/2011/067.

Has the charge of improperly soliciting and receiving monies from local citizens in exchange for their initial recruitment and service as United Nations staff against the Applicant been substantiated?

75. On 12 November 2007, the Applicant was charged with misconduct on the basis that she improperly solicited and received monies from local citizens in exchange for their initial recruitment and continued service as United Nations staff. Specifically, she was charged with violating the following provisions governing the basic obligations of staff, staff regulation 1.2 and staff rule 301.3. The relevant parts of these rules are reproduced below.

Staff regulation 1.2:

(g) Staff members shall not use their office or knowledge gained from their official functions for private gain, financial or otherwise. Nor shall staff members use their office for personal reasons to prejudice the positions of those they do not favour.

Staff rule 301.3:

(i) Staff member shall neither seek nor accept any favour, gift, remuneration or any other personal benefit from another staff member or from any third party in exchange for performing, failing to perform or delaying the performance of any official act.

76. As stipulated above, the elements of the charge include the following:

- a. Use of office or knowledge gained from official functions for private gain, financial or otherwise.
- b. Use of office to prejudice the positions of those the staff member does not favour.
- c. Acceptance of any favour, gift, remuneration or any other personal benefit from another staff member or from any third party in exchange for performing, failing to perform or delaying the performance of any official act.

77. The foregoing are the legal elements that would need to be substantiated to justify the charge against the Applicant of improperly soliciting and receiving monies from local citizens in exchange for their initial recruitment and service as United Nations staff.

Did the Applicant use her office or knowledge gained from her official functions for private gain, financial or otherwise?

78. The evidence before the Tribunal is that Applicant was employed as a Junior Clerk on a 300-series appointment at the GL-2 level. Her unchallenged evidence is that she prepared the list of new recruits from a list that came from the international supervisors. She was not the one who made the decisions on recruiting the daily staff. This was done by the supervisor of each unit together with the Officer-in-Charge. It was only the supervisors who knew the list of CDWs who were to be rotated. They would rotate the number of people they wanted and take on new ones.

79. The Applicant submitted that she was given a handwritten list of CDW candidates or her supervisor collected the number of ID cards required and she transcribed the information they provided. Both her supervisor and the officer in charge reviewed the lists. She passed along the finalized copy of the list to security to post by the gate. Not only did she not have control over the process, but the CDWs knew her supervisor did, because he either handwrote lists or collected IDs at the gate and the CDWs often spent one to two months hanging about outside the gate.

80. The Applicant testified that she could not have manipulated the list because when the heads of unit went on mission, they took copies of names and they also knew the individuals concerned. If the heads of unit returned and saw a different person whose name was not on the list this would have caused problems.

81. It was not within her power to change the lists. All the lists were signed by the supervisors and sent to each unit. She could not change or add anyone to the list because after the list was typed up on the computer, the signature of the supervisor was appended to it.

82. The Respondent argued that no other staff member typed up the list of new recruits and the payroll list and that although the Applicant explained to the Tribunal that her supervisors would approve the lists before they were posted, there is no evidence on record that her supervisors actually signed their approval of the lists. The Applicant never called her supervisors as witnesses either before the former JDC or this Tribunal to corroborate her explanation that she could not have manipulated both lists.

83. The Respondent submitted that there was no evidence that the Applicant was either closely monitored or that the list of new recruits was checked by another person in order to ensure that the integrity of recruitment process was not compromised and that in this regard, the former JDC correctly found that the Applicant was in a position to improperly add a name to the list. The Respondent's reasoning is simply flawed. The evidentiary burden is on the Respondent to show that the Applicant's version of events is untrue.

84. The Respondent falls far short of the evidentiary standard of proving this element of the charge. No documentary evidence was tendered to show that the Applicant manipulated any list. The assertion that the Applicant should have tendered evidence to prove that she was closely monitored or that the list of new recruits was checked by another person in order to ensure that the integrity of recruitment process was not compromised is ludicrous. On the basis of the evidence before the Tribunal, it was the responsibility of the supervisors who prepared the lists to ensure that the people they recruited were the actual people that turned up for work. The Tribunal finds no proof that the Applicant used her office or knowledge gained from her official functions for private gain, financial or otherwise.

Did the Applicant use her office to prejudice the positions of those she did not favour?

85. To satisfy this element of the charge, the Respondent is required to prove, beyond a balance of probabilities, that the Applicant used her office or position to ensure that certain CDWs were not recruited or that when they were recruited, they were then “rotated” (as defined by the Applicant) if they failed to pay her money as she demanded. Such CDWs would then not return to work in the Engineering Section in Bukavu.

86. The uncontested evidence before the Tribunal is that the Applicant had no authority in the recruitment of CDWs or in their rotation. The Respondent’s argument is that the Applicant gave the perception that she had the authority to hire and fire CDWs by virtue of the fact that she was the responsible for the list and that the Applicant simply exploited this perception for financial gain. The Respondent relied on the voluntary statements of Messrs. Masudi and Lievain and on their untested evidence during the JDC hearings. As earlier stated, the absence of these two complainants from the proceedings meant that the Tribunal did not have an opportunity to assess their credibility. Their recorded statements alone are not sufficient to establish this element of the charge.

87. The Respondent has adduced no documentary evidence to substantiate this charge. The Tribunal would at the very least have expected to see the original lists given to the Applicant by her supervisors and the lists allegedly altered by the Applicant.

Did the Applicant accept any favour, gift, remuneration or any other personal benefit from another staff member or from any third party in exchange for performing, failing to perform or delaying the performance of any official act?

88. The Respondent did not adduce any evidence to show how the Applicant manipulated the list of new recruits or placed any unapproved names on the list. The Respondent has failed to produce evidence that raises a reasonable inference

that the Applicant accepted remuneration from the CDWs in exchange for recruiting and retaining them in the service of the Organization.

Findings

89. The summary of the Tribunal's findings and conclusions are as follows:
- a. The Respondent did not adduce any evidence to show how the Applicant manipulated the list of new recruits or placed any unapproved names on the list.
 - b. The absence of two of the complainants from the proceedings meant that the Tribunal did not have an opportunity to assess their credibility. Their recorded statements alone are not sufficient to establish their allegations.
 - c. Mr. Bisho is an unreliable witness. The incomplete evidence given by him is inadmissible and has no probative value.
 - d. The entire investigation consisted of asking witnesses to give what were described as "voluntary statements" from which the investigators drew unsubstantiated conclusions.
 - e. Despite acknowledging that they lacked sufficient evidence and that they had not established the allegations by the complainants, the Investigators went on to recommend that administrative sanctions be instituted against those against whom allegations were made, including the Applicant in this case.
 - f. The charge of improperly soliciting and receiving monies from local citizens in exchange for their initial recruitment and service as United Nations staff against the Applicant has not been substantiated.

Judgment

90. The sanction of summary dismissal was based on unsubstantiated charges. Accordingly, the Tribunal:

- a. Rescinds the Applicant's summary dismissal and holds that until the date of this judgment the Applicant remained lawfully in the service of the Organization.
- b. Orders the Respondent to reinstate the Applicant in service of MONUC (or MONUSCO) with retroactive effect.
- c. Since the Applicant's dismissal is a termination within the meaning of art. 10.5 (a), the Tribunal must, pursuant to that article, set an amount of compensation that the Respondent may elect to pay as an alternative to the reinstatement of the Applicant. An appropriate compensation in lieu of reinstatement is to be the amount of two years' net base salary of the Applicant.
- d. The Tribunal orders that all material relating to the Applicant's dismissal be removed from her official status file, with the exception of this judgment and any subsequent action taken by the Administration to implement it.
- e. Rejects all other pleas.

(Signed)

Judge Nkemdilim Izuako

Dated this 18th day of September 2012

Entered in the Register on this 18th day of September 2012

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi